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The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War

Kenneth Anderson *

I. INTRODUCTION

Over the years dealing professionally with US military lawyers on matters of the laws of war, I have often been struck by the following disjunction.

On the one hand, the public attitude of career US military lawyers who deal with matters of the laws of war has typically been unapologetically lawyerly. By that, I mean an attitude which is strongly professional, in the sense of representing a client who happens to be the US government, deploying a body of technical law in a technical and narrowly legal way. Consistent with this markedly lawyerly attitude, the US military lawyer's legal language is strongly declarative of the US military's realistic interest in the outcome. In his or her view, the lawyer exists to shape in legal language the client's interests, whether that be the continued use of landmines in the Korean peninsula or the illegality of taking civilian hostages in the Iraq war. The language of the US military's lawyers thus is typically a language that, while not devoid of moral concerns, is more centrally concerned with protecting a technical legal result in technical legal terms—lawyerly language for a lawyerly result—and thus protecting a client's real interests. It is a language conspicuously devoid of references to an underlying moral vision of the laws of war, a technical language with little to indicate that a moral vision even exists in which this lawyerly language and concern for client interests are embedded.

On the other hand, when I speak privately with US military lawyers, it is abundantly evident that, almost to a person, they have a clear moral vision of the meaning of the laws of war and why they are so important. In private, they are almost always able and indeed happy to articulate how and why it is important that their professional and public legal work be embedded within a moral framework. Sometimes they draw inspiration from the particularly American law

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of war tradition of the Civil War jurist Frances Lieber and the “Lieber Code,” which President Lincoln made applicable to Union armies.¹ At other times they may draw on the theological traditions of the just war, or on early modern jurists such as Grotius, or they may simply draw on the general tradition of the “laws and customs of war”—which, by placing a soldier’s killing and destruction within the confines of law and honor, makes the profession of arms more than mere killing. Yet this moral background is rarely articulated in public. By that I mean that the moral underpinnings of the technical law are rarely articulated in ways that give support to one conclusion of law over another; lawyers do not appeal to those moral underpinnings as a source for interpreting and understanding the technical law, and in my experience, the US law of war policymakers do not explicitly appeal to those underpinnings to shape the laws of war in new circumstances, such as the war on terror. This is often true even in circumstances in which at least some outsiders like myself would have thought that an appeal to that moral vision would give US positions much greater weight on various topics concerning the laws of war: issues such as the International Criminal Court, landmines, or “acceptable” collateral damage. Instead the emphasis remains on narrow legal arguments conjoined with a claim that “this is how we do it and this is good for the US,” which is a distinctly non-moral argument.

Yet something of the private moral vision *does* emerge, to be sure, amidst the professional detachment. It is hard to describe, because it is not precisely an analytic quality, not a form of legal argument, but rather an emotional affect coloring the background. In my experience, it emerges not as a form of argument, but rather as an emotional desire to find common ground with those on the other side of the arguments over the laws of war, those who have *already* claimed the moral high ground, a ground which US military lawyers feel privately ought to be theirs—or, at least, a moral ground that they share. It expresses itself as an oftentimes sentimental desire to please the other side, notwithstanding that the legal positions do not permit it. It sometimes amounts to a desire among US lawyers for an acknowledgment from everyone else that we are all on the side of humanity despite the gap in our legal positions, and it results in a peculiar disconnect between public legal positions and the emotional content of the lawyering.

Realists in public, representing a client, and yet idealists in private, with a certain amount of suppressed idealism spilling over into the emotions of lawyering—this Article speculates on why that disjunction might exist, and queries whether it is a good thing. Specifically, it urges that in matters of the laws

¹ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (Apr 24, 1863) (promulgated as General Orders No 100), in Dietrich Schindler and Jiří Toman, eds, *The Laws of Armed Conflicts* 3 (Nijhoff 3d ed 1988).

of war that spill over into public diplomacy, negotiations over changes and the evolution of the laws of war, and controversial applications of the laws of war, it is a large mistake for the US military legal establishment to believe that it can ignore giving public articulation to the larger moral vision that ought to attend and inform the laws of war. Ignoring the moral arguments is especially dangerous when debates on the laws of war take place in the public eye; even more so when the debates attend actual military conflicts. This is so, I suggest, in part because those critical of US government positions in these matters—other governments and nongovernmental human rights and humanitarian organizations—capture the moral high ground because they unabashedly argue from moral fundamentals, and do so directly and successfully to the public.²

This is not a call for US military lawyers to “spin” a moral vision that they do not have. But in my experience, these lawyers *do* have a moral vision of the laws of war, and it varies in both principle and application from the vision of human rights and humanitarian organizations and other governments. It differs, I suggest, on at least two fundamental principles. First, US military lawyers acknowledge the importance of *winning* that comes with the moral point of view of a democratic state that actually fights wars, rather than relying on the moral point of view of states that no longer contemplate fighting war or humanitarian or human rights organizations that have neither obligations of governance nor of fighting; humanitarianism is an easy virtue to proclaim if no one fundamentally depends upon you for protection. Second, the vision of US military lawyers depends upon a commitment to sovereign democratic governance, whereas that of their opponents is often situated in an ideal of liberal internationalism or supranational global governance. If US government lawyers have such a vision, then they should be public about it. They should forthrightly state it in the public eye. If others disagree with it or disagree about what should result from it, they should say so, and by that means advance the common moral vision of the laws of war—including, to be sure, the idea that there are things the US should learn from the rest of the world.

This is a recipe, at its best, for open debate, and at its worst, for mere argument and bad feeling. But being publicly clear on fundamental principles, even at risk of rancor, is the only way for the US government to explain its strong feelings on matters ranging from the International Criminal Court to its policies on military commissions. It is neither strategically in the interest of the US nor morally in the common global interest for US military lawyers to engage with the laws of war as though moral underpinnings were not part and parcel of

² See, for example, UNICEF Office of Emergency Programmes, *UNICEF Mine Action Strategy 2002–2005* at 3, available online at <http://www.unicef.org/emerg/Unicef_mine_action_strategy_2002_2005.pdf> (visited Sept 27, 2003).

the inheritance which US military lawyers proudly and properly regard as the “laws and customs of war.”

II. MILITARY REALISTS VERSUS NGO IDEALISTS IN NEGOTIATING THE OTTAWA CONVENTION BANNING LANDMINES

US military lawyers’ relatively bloodless articulation of the laws of war, together with a sometimes touching eagerness to be counted among the “good guys,” contrasts strikingly with the public language of those with whom US military lawyers often find themselves opposed in public controversy: representatives of nongovernmental organizations (“NGOs”) such as Amnesty International, Human Rights Watch, or, on occasion, the International Committee of the Red Cross; lawyers and diplomats for other governments, especially from the European Union and its members; and representatives from United Nations entities, among others.

For NGOs and others and, as a consequence, for much of the international media, articulating a moral vision of the laws of war is at the very center of matters. Technical legal arguments are merely tools to that end, because the audience is neither a court of law nor even lawyers, but instead the court of elite international public opinion, as filtered through the media. Whether US military lawyers and their client are “good guys” or “bad guys” depends merely on the extent to which the US position matches that of the NGOs. In that regard, NGOs are entirely unsentimental realists, and there is no room to “agree to disagree” among the “good guys.” For the moralizing NGOs, there is, unfortunately, only adherence to a certain NGO-promulgated ideal of the laws of war or excommunication from the ranks of the good. And since the NGOs have no security interest to defend, the ultimate outcome of legal argument, for them, *is* the moral vision from which they started, without any pressure to take the real world into account. Unlike US military lawyers, a lawyer for an NGO is able to aim technical legal arguments solely toward validating a pure, particular moral vision of the “law,” because that vision need make no concession either to the realities of how an army fights, limited by logistics and technology, or to the importance, as Michael Walzer put it, of winning.³

One way of explaining the debate between the US military and the NGOs who organized the international campaign to ban landmines—the first large-scale contemporary campaign to result in a major new laws of war treaty, the 1997 Ottawa Convention banning landmines⁴—is as an example of the different

³ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 109 (Basic Books 3d ed 2000).

⁴ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 36 ILM 1507 (1997). My own sense of the

ways in which the parties applied their differing moral visions to the laws of war. The US, like other governments, took a long time to understand that the movement was serious and had a chance of succeeding in creating a widely ratified treaty. The US's attitude during the early years of the campaign was that although it understood and sympathized with the humanitarian issues raised by landmine use—indeed contributing monetarily very significantly to landmine removal—the flat-out ban insisted upon by the NGO campaign was unacceptable because it took no account either of the realities of fighting or of the fact that the laws of war had accepted landmines as a legal weapon since time immemorial. Moreover, in a kind of plea of outraged innocence, the US insisted (quite unpersuasively, given its use of wide-dispersal air-delivered mines) that its landmine use was “responsible,” not indiscriminate, and hence US practice could not be considered a problem. Moreover, the US argued, it would solve the problem through technological fixes such as automatic self-destruct mechanisms on the mines.⁵

Positions advanced by US lawyers and diplomats were complicated, inevitably, by vacillations by the lawyers' clients. These multiple clients included the Clinton administration and all manner of different agencies within the State Department and the Pentagon, weighing in toward one position or another. Opposition to the ban treaty in the Pentagon was offset by support for it, at least in principle, in parts of the Clinton administration and in Congress. These conflicts produced a desire by the US to have it both ways—to be able to support the ban treaty in principle while not being bound by it in practice. This is a normal fact of life for counsel representing a client that is really a collection of entities—signals are often crossed and confused. Yet it is one of the fundamental reasons for the disjunction between US military lawyers' public and private attitudes toward projecting a moral idea of the laws of war. It is hard to project a moral ideal if you have multiple and conflicting clients, quite apart from the problem of reconciling ideals with realities of war.

But in addition to client tensions, there is a second problem—an issue that has to do with the fundamentals of lawyering and the role of the US military lawyer. I have perceived, in my own experience, a seeming tendency of US military lawyers to search for common ground with NGOs and other negotiators—a desire to be seen as part of the good guys even while having their own interpretations of the laws of war as well as the interests of a particular client to defend. This tendency was visible throughout negotiations over the

intellectual history of the landmines ban campaign is found in Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 Eur J Int'l Law 91 (2000).

⁵ See Kenneth Anderson and Monica Schurman, *The United Nations Response to the Crisis of Landmines in the Developing World*, 36 Harv Int'l L J 359, 367–68 (1995) (discussing the US preference for technological self-destruct solution to landmines problem).

landmines ban treaty with US military lawyers during the mid-1990s. The lawyers seemed eager—indeed, sometimes seemingly desperate—to find some common ground with the NGOs and some compromise language that would allow the US to join the treaty. It seemed to me to go well beyond the vacillations of the clients and the political desire of the Clinton administration to join the treaty while not compromising its military interests. It reflected more than merely the client's confused and contradictory desires but was, rather, a feature of the fundamental approach of the US military lawyers. Beyond even their client's wishes, *the lawyers* wanted to find a mutually satisfactory solution that would show them, in the end, to be part of the “good guys.” So much so, I sometimes thought, that it blinded them to the no-compromise nature of the NGO campaign. The US military lawyers seemed to think, far into the process, that it *was* a negotiation, whereas on the fundamentals of the treaty—use, possession, stockpiling, production, and transfer of landmines—the NGO movement would sooner lose, or at least hold out for the long haul, than compromise or negotiate.

That experience brought me to see the tendency of US military lawyers to seek common ground and the desire to be counted among the “good guys” as a result of their implicit, emotional acceptance of the NGOs' position that the NGOs, being pure and unsullied by “interests,” were alone able to articulate the ideal laws of war. What is implicit is that the laws of war are “owned”⁶—in the sense of who sets their terms, who interprets them authoritatively, who pronounces on them with public legitimacy, who controls their evolution—not by democratic states that actually fight wars, but instead by morally pure NGOs, who are, so to speak, angelic by nature because they lack earthly interests and temptations. Deviation from the position of the angels seemingly could never result from an alternative, and possibly even morally superior, view of the ideal, but instead could only be the ugly and morally unacknowledgeable realities of fighting or else evidence of wickedness. There is a great deal more to be said—much more than is usually said—about the assumption that NGOs are somehow pure and without “interests.” NGOs do indeed have interests, even if they cannot all be measured in purely material terms.⁷ But in part, the tendency to seek common ground is, curiously, the flip side of the US military lawyer's focus on the pragmatic realities of war fighting. If the lawyering approach is ultimately one of pragmatically satisfying a military mission, then the lawyer tends to try to find any compromise, no matter how conceptually inelegant or awkward, because if it is possible to reach a win-win situation, treaty language

⁶ See Kenneth Anderson, *Who Owns the Rules of War?*, NY Times § 6 at 38 (Apr 13, 2003).

⁷ This summarizes a larger argument about NGOs and their self-conceptions of angelic, indeed religious virtue. See Kenneth Anderson, *Secular Eschatologies and Class Interests of the Internationalized New Class*, in Carrie Gustafson and Peter Juviler, eds, *Religion and Human Rights: Competing Claims?* 107 (ME Sharpe 1999).

that at least in the short term everyone can live with that does not undermine the military mission, then so much the better.

In many—indeed most—situations, that is an admirable approach to the laws of war, because in many situations there are many military means that can accomplish the same mission. Moreover, under pressure of humanitarian concerns and humanitarian actors, technology can frequently be improved; the remarkable improvements in targeting and precision weaponry that the United States now possesses owe much indirectly to public pressure in a domestic democracy. I do not mean to suggest that this pragmatism ought not to be a core attitude of the military lawyer acting as negotiator—it should. But it has to be understood that in some cases—the landmines treaty being an example—such pragmatism cannot cope with a situation that is not fundamentally a negotiation at all. In those situations, the client must make a decision about what it wants, and it may well be the most significant task of the US military lawyer to help the client confront the fact that it cannot have it all ways. In addition, the US military lawyer cannot start from the assumption that the ideal of the laws of war is necessarily articulated correctly or best by the NGOs, and that being one of the “good guys” is defined by the posture of those negotiating, or dealing through the media, on the opposite side from the US lawyers. In the end, the military necessity of landmines in defense of Seoul, today, at least, remains inescapable—that is both a military fact and also a moral obligation all its own. Perhaps technology or politics or regime change could alter that equation in the future, but it is not the factual reality, and not the moral reality, today.

Thus, for example, even when the US made clear that the Korean peninsula landmines were the fundamental issue, the language used to defend that position by US negotiators was, once again, oddly bloodless and lacking in moral plainness, while at the same time oddly emotionally plaintive.⁸ Landmine use in Korea was presented as a technically insurmountable military necessity, or in similarly realistic language of military tactics. On no occasion of which I am aware did anyone assert as a fundamental *moral* issue the obligation to protect

⁸ See, for example, US Department of Defense, *DoD News Briefing: Tuesday, June 17, 1997–1:30 p.m.* at 6, available online at <http://www.dod.gov/news/Jun1997/t06171997_t617dasd.html> (visited Sept 27, 2003). The NGO campaigners were almost certainly right, however, that the US was not acting in good faith in presenting Korea as its fundamental problem. They were convinced—correctly, in my view—that the Clinton administration, never intended to give up the main use of landmines in the US weapons inventory—as part of “mixed” anti-tank, anti-personnel remotely delivered systems, and that this was the real issue for the Pentagon, not the static border “demarcation” minefields separating the Koreas. In that regard, the NGO movement was right to reject any move to weaken the treaty to accommodate the US on Korea as it would not have satisfied the US. On the other hand, I am equally positive that even had the Korean peninsula been the only issue, the NGO movement was sufficiently committed to a completely “pure” approach that it would still not have accommodated the US within the actual treaty language.

the civilians of Seoul and not to invite, through potentially destabilizing actions such as unilaterally removing minefields, a North Korean response based on a perception of weakness—possibly resulting in a war the evils of which would far, far outstrip even the considerable good of the landmines treaty. I never heard the protection of South Korea articulated as a moral obligation or moral good which had to be set squarely against the evils of landmines. On the contrary, US negotiators seemed to me wedded to a combination of morally deaf realist argumentation combined with a pragmatic desire to find a compromise even where it was plain that the nature of the process precluded compromise. The NGOs were not interested in compromise; on the other hand, they had no obligations to protect Seoul.

The point is not really a complicated one. US military lawyers adopted a double approach: speaking in realist terms of essential military missions, on the one hand, while seeking a compromise on the landmines treaty, on the other, that would keep them in the camp of the virtuous and angelic as defined by the ban campaign. But whether asserting essential military missions or seeking pragmatic compromise, and although sympathetic to the ban campaign's moral concerns, US lawyers always employed a language of *interests*, even when delivering it in an emotional tone that suggested, "How can we prove we're good guys too?" The NGOs, on the other hand, seized and held the moral high ground from beginning to end by always representing the issue in stark moral terms, and constantly asserting that their view of morality was the only one that mattered. There were other moral considerations that could and should have been presented, such as the moral obligation to protect civilians in South Korea, but these were typically presented by the US military as technical military mission issues, not as fundamental moral questions. It is admittedly not very likely that, if the issue of the Koreas had been asserted as a fundamental moral obligation not to endanger civilians, the NGO movement might have seen a greater need to accommodate, at least for some period of time, in order to avoid the *moral* and not merely practical problems of destabilization, otherwise known as the risk of war, between the Koreas. But at the least the question of unilaterally leaving a city of millions exposed should have been presented as a moral question, because that is what it is. It is as much a moral issue as the plight of landmine victims.

Such a moral debate would have been good for the Ottawa Convention. After all, despite the admirable success of the treaty not only in achieving paper ratifications, but in curtailing actual production, trade, and use of landmines, it has seemingly reached the outer boundaries of adherence. The treaty is universally adhered to by states that do not seriously contemplate having to fight wars, whereas very few states that do contemplate having to fight wars have signed on. Non-adherents include the US, the Russian Federation, and China—most of the Security Council permanent members—as well as India, Pakistan,

Israel, and most other Middle East nations. Moral absolutism on the part of the NGO movement has altered forever how landmines are seen, and that achievement should be honored. But it has also built a wall between war fighting and non-war fighting nations with respect to the treaty that is not likely to be dismantled soon and which in the long term is a serious stricture upon it. That wall *might* not have become quite so unyielding had the arguments over such things as a long-term transition away from landmines in fixed fields demarcating international borders in the Koreas, for example, been presented not as purely technical military questions or questions of interests, but as countervailing moral arguments. It would have required that the US have acted, and be seen to act, in good faith in saying the Korean mines were the issue and not a stalking-horse for other landmine uses. Perhaps the mechanism might have been a side agreement committing the US to a timetable on removal in South Korea rather than accommodation within the treaty itself.⁹ But the only party who might conceivably have done so, the US, did not.

III. A CLASH OF INTERESTS OR MORAL VISIONS IN NEGOTIATING THE INTERNATIONAL CRIMINAL COURT?

The same pattern of US military lawyers asserting arguments of interests against a broad and easily understood moral vision can be seen in the negotiations and arguments over the International Criminal Court ("ICC"). But this surface similarity is profoundly misleading. In the case of the ICC negotiations, behind the surface facade of a US negotiating language of interests and European-NGO language of lofty ideals, the negotiations themselves took place in an atmosphere in which the US, appearances to the contrary, fundamentally had no room to negotiate, while ICC proponents, appearances to the contrary, thought they were negotiating with the US on pragmatic, realist issues only to discover that the true issue was a non-negotiable issue of principle from the very beginning.

Like the Ottawa Convention, the ICC is the product of an alliance between NGOs and "like-minded" states, relying upon the good will of an international media that is instinctively in favor of high-minded institutions that reflect a preference for global governance. Once again, the campaigners' position adopted a lofty moral high ground, at once easily visible, easily articulated, and sentimentally appealing to the global middle classes and international media: a single standard and an impartial global court to adjudicate serious war crimes

⁹ Indeed the Clinton administration did offer a vague plan to look for technological solutions to the South Korean mines with the implicit hint that if it could find a suitable solution it would implement it and then join the treaty. But no one took that very seriously, inside or outside Washington, as it was evident that neither Clinton nor Gore was willing to buck the Pentagon on any aspect of landmines.

allegations that would otherwise go unadjudicated. No more “victor’s justice”—who could object to that?¹⁰ And once again, the US has been portrayed as asserting positions based solely on its interests, indeed upon its most narrow and parochial interests, in not trusting “impartial” outsiders to judge cases of war crimes involving its own military personnel and in demanding special treatment for its own on the nearly insulting ground that the world’s sole superpower deserves special license to set its own rules.

The question is how the US has made its own case through its lawyers, military and otherwise, and diplomatic personnel. As in the landmines negotiations, the governmental client—the Clinton Administration—gave wildly mixed signals to its negotiators and to the rest of the world while the Rome Statute (the ICC statute) was being negotiated. It asserted that the world’s “indispensable” power required special rules, or it would refuse to play the role required of it as guarantor of global stability—seemingly requiring some kind of opt-out provision for the US. At the same time, its negotiators worked endlessly on the substantive definitions of crimes over which the ICC would have jurisdiction—an exercise that made sense only if the US intended ever to be bound by it—the result of which was a remarkably well-drafted criminal code. The EU expended great effort seeking procedural fixes that would allow the US to sign the treaty while not actually having its service personnel subject to it in reality. The Clinton administration vacillated publicly and privately over whether to join the treaty, and finally signed hours before President Clinton’s term ended. Subsequently, the Bush administration promptly “de-signed” the treaty—a novel procedure in international law, aimed at sending a political signal that its opposition was real.

But the difficulties went beyond a clash between hard-nosed American interests and the sentimental moral vision of the ICC campaigners. The much more fundamental problem was that the US government, as a client, refused to acknowledge that its fundamental issue was a moral, not a practical, one—not a matter of humanitarian morals in this case, but of political fundamentals and

¹⁰ I have argued strenuously elsewhere that victor’s justice is sometimes the morally correct position, and that neutrality is sometimes a morally dubious position, although sometimes undeniably prudent. Was it right to be neutral in the struggle against the Nazis? Were the world’s neutrals morally superior or even equal to those who fought against Hitler? Would it have been morally better to have turned the prosecution of Nazi war criminals over to the neutrals who had declined to get involved, in order that it not be seen as victor’s justice? That would be pernicious nonsense. Under some circumstances, it seems to me, victor’s justice is precisely what justice requires, because it signifies that you have been willing to pay the price in blood to achieve it, while those who stood aside from the fight have no moral standing with regard to justice against evil at all. See Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor’s Memoir of the Nuremberg Trials*, 7 Harv Hum Rts J 281, 292 (Spring 1994), reviewing Telford Taylor, *The Anatomy of the Nuremberg Trials*; Anderson, *Who Owns the Rules of War?*, NY Times § 6 at 41 (cited in note 6).

constitutional morality. It was fundamentally a question of democratic sovereignty. At the end of the day, the US would either subordinate its constitutional structure to the discretion of a prosecutor outside of the US constitutional system, or it would not. No amount of compromise language could elide this problem. The Clinton administration could not bring itself to admit publicly that sovereignty was the issue, rather than the quality of the procedures or the drafting of the substantive criminal provisions.

This was so in no small part because the Clinton administration, judging from the outside, was deeply divided among its policymakers over the question of sovereignty. The Department of Defense, of course, was adamantly opposed to the Rome Statute, and President Clinton, looking out partly for his partisan interests and partly for those of Vice President Gore, was famously unwilling to take on the military. But statements from Clinton himself and others since he left office (especially when addressing European audiences) have indicated that important players, including the then-president himself, sympathized deeply with the European trend of giving up sovereignty to transnational actors. When the ICC treaty came into force in 2001, Harold Koh, who had been Assistant Secretary of State for Democracy, Human Rights and Labor, called it “an international *Marbury* versus *Madison* moment”¹¹—the moment, in other words, when precisely what so many human rights organizations had been denying so strenuously¹² had come to pass: sovereign states really had become subordinate entities in a global federal structure, at least with regards to war crimes. Others—Madeline Albright seems to have been one—appeared to think that if the superpower gave up sovereignty to a transnational actor, it effectively gave it up to itself; because it was the superpower, the US could still have it all. The net effect, however, of all these unresolved strands of ideology within the client or, more precisely, among the clients, was that the Clinton administration could not bring itself to decide that fundamental issue, or at least to announce a single view.

As a consequence, the Clinton administration’s lawyers and negotiators were left in the position of having to negotiate as though all the *other* issues were the true issues, whereas in fact they were always, no matter how crucial to the functioning of the ICC, issues incidental to the fundamental question of sovereignty. Moreover, the negotiators sometimes brought their own views to the table. I do not mean to imply by this that they were nefarious—far from it. Certain negotiators, such as the Ambassador for War Crimes, David Scheffer, were chosen for the position precisely because they had points of view. The

¹¹ Neil A. Lewis, *U.S. Is Set to Renounce Its Role in Pact for World Tribunal*, NY Times § 1 at 18 (May 5, 2002).

¹² See, for example, William Zabel, *A Court to Embrace*, NY Times § 4 at 10 (Apr 15, 2001) (letter to the editor).

current president of the Yugoslavia Tribunal, then-New York University law school professor Theodor Meron, was brought onto the negotiating team partly because of his academic preeminence in the field of the laws of war, partly because of his long and sympathetic international contacts, and partly because he represented an important, honorable ideological camp within the Clinton administration that firmly believed that joining the ICC was in the best interest of the US and aligned with its moral compass, if certain questions about jurisdiction, procedure, and substance could be worked out, and that the best way to work them out was through negotiators who were unquestionably in favor of the idea of an ICC.

Yet in the end, the issue of sovereignty could *not* be set aside, no matter how it was papered over. It would have been far better had the question of US participation in the ICC been openly debated in the first place, not as a matter of special privileges for the superpower, nor as a matter of internal procedures or the substance of the ICC, but instead as a question of fundamental sovereignty. But when the issue of sovereignty was joined, even that question was redrawn as a question of interest versus moral vision. When the question of sovereignty arose in public debate—American neoconservatives made it the centerpiece of argument within the US—NGO campaigners and their allied European states succeeded, in the international public eye, in making that into “merely” a question of interests, arguing that naturally, the US, being powerful, had an “interest” in not giving up sovereignty. Sovereignty was equated with power, just another interest that ought not to stand in the way of the “moral” vision of a world governed, in matters of fundamental morality such as war crimes, by transnational justice.

But of course there is another way to look at sovereignty, one which looks to the self-determination and democratic self-governance of a political community true to itself, to democratic sovereignty not as the expression of power but rather as a moral vision of self-government. It is as much or more a compelling moral vision as its rival, liberal internationalism and global supranational governance, the highest ideals of the ICC campaigners. This moral vision of sovereignty—sovereignty as an expression of a democratic moral vision—was rarely asserted, as far as I am aware, by the US in its negotiations over the ICC. And with good reason, insofar as the US wanted to continue to believe that it could have it both ways—participate but not be bound. If it had asserted that the moral vision of democratic sovereignty underlying the US constitutional order precluded conceding powers to the ICC prosecutor, which the rest of the negotiating states proposed to do, then the game was up. What would be left for the US to negotiate? Yes, US negotiators improved the Rome Statute immeasurably, especially in the substantive definitions and elements of crimes. But that was necessarily a sideline to the fundamental moral question of democratic sovereignty—or so it should have been.

The failure of the client—the client, I emphasize, not the lawyers—to be straight about its genuine bottom line and to recognize internally that its bottom line was truly non-negotiable *because* it was a fundamental moral matter for the US as a political community, led to a dismaying series of follies that account for much of the ill will that the ICC process has garnered the US in recent years. To be picturesque, the confusion in the US posture put its negotiators, including its military lawyers, in the unenviable position of flirting for years with no actual intention of going to the altar. European states took seriously US representations that its objections were pragmatic, particular, and remediable through negotiations; they made extraordinary concessions, as they saw it, to US sensibilities in an effort to keep the US in the process. They did so hoping that if they could only resolve this procedural issue or that, this substantive definition or that, the US would run out of objections. In the end, the US would conclude that its *interests* had been protected, and it could join the treaty.¹³

Endless US objections ironically improved the Rome Statute. But in the end, just as the NGO campaigners in the landmines negotiations were not really willing to compromise anything important, the US was not really involved in a negotiation either, although the confusion of its many clients within the US government obscured that fact over and over again. The debate was not in the end about interests. The moral value of democratic constitutional sovereignty finally trumped all other considerations—and that should have been clear to the US government from the beginning. The failure to see clearly that sovereignty was a moral issue that went beyond practical considerations altogether left the US endlessly playing the tease. No doubt many of the pro-ICC actors within the Clinton administration knew this perfectly well but made a bet that they could nonetheless create enough drift to pull the US along by inertia. Perhaps things might have turned out differently with a Gore administration in 2000—but perhaps not. It is also true that European governments, locked in a love affair of their own with supranational governance and, compared to the US, lacking in long, continuous traditions of democratic constitutional sovereignty,¹⁴ were equally unable to negotiate the fundamental conflict between supranational governance and democratic sovereignty. But in the event, it was the US who played the tease, dangling the possibility of its acceptance if only this or that demand were met, while Europe allowed itself to be seduced time and again into thinking *this* would be the final concession. European governments reacted to the de-signing of the Rome Statute with all the vitriol of a lover spurned.

¹³ Not dissimilar, in other words, from the way in which France, for example, had protected *its* interests by negotiating a seven year opt-out from the Rome Statute.

¹⁴ Conrad Black, *Westward Look, the Land Is Bright*, Spectator (London) 12 (July 15, 2000) (“Few of [Europe’s] political institutions . . . have any seniority or proven value.”).

IV. COMPETING MORAL VISIONS OF THE LAWS OF WAR: THE STATUS OF DETAINEES AT GUANTÁNAMO BAY AND ARGUMENTS OVER ILLEGAL COMBATANCY

The lesson for US military lawyers negotiating laws of war treaties is plain, even if they are unable to act upon it: if the client does not know its own mind or speak with one voice, its lawyer-negotiators will not be able to do so either, and the result will very likely be grave misunderstandings and bad blood at the negotiating table. In the ICC negotiations, client confusion prevented the lawyer-negotiators from asserting what was in fact the heart of the matter—a moral vision of democratic constitutional sovereignty—and it obscured the critical moral issue in a cloud of important, but finally collateral, pragmatic details. Thus a notable tendency of US military lawyers, as we have observed in both the landmine treaty and ICC negotiations, is to allow the terms of the moral high ground to be set by the parties on the other side: NGOs and holier-than-thou European governments who have no actual obligations to fight. Sometimes that moral high ground is claimed with respect to the humanitarian aspects of the laws of war themselves, as in the case of the debates over landmines, while other times it is claimed with respect to still larger moral and political visions—liberal internationalism versus democratic constitutional sovereignty, as in the case of the ICC. The unfortunate pattern of US negotiators in these matters is to allow the moral terrain to be defined publicly according to moral ideals which may or may not accord with US views and to argue merely over the realist details of what is, in the end, someone else's vision. It is fundamentally the wrong approach, not merely because it leaves the US at a disadvantage in negotiations, but far more profoundly because it gives tacit US assent to moral visions which sometimes in fact it does not, and should not, share.

Perhaps nowhere is the clash of ideals about the laws of war more evident today than in the still-flaming debates over the US decision to treat various detainees in the Afghanistan war as “unlawful combatants,” and therefore ineligible for the protections the Third Geneva Convention accords to prisoners of war. The legal and textual arguments, debating the Third Geneva Convention's definition of those entitled to prisoner of war status, have been laid out in many articles and will not be rehearsed here.¹⁵ More importantly for

¹⁵ A good place to begin in the now voluminous literature is with three quite sharply contrasting essays on the Military Tribunal Order: Kenneth Anderson, *What to Do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 Harv J L & Pub Poly 591 (Spring 2002); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 Harv J L & Pub Poly 635 (Spring 2002); Diane F. Orentlicher and Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists before Military Commissions*, 25 Harv J L & Pub Poly 653 (2002).

the present discussion is that in asserting that the US would treat these detainees as unlawful combatants ineligible for Third Geneva Convention protections, the Bush administration took steps toward publicly holding out a vision of the laws of war that was more than merely a legalistic reading of the Geneva Conventions or mere assertion of interests. At least on a few occasions—the occasions when it was most publicly persuasive—it appealed directly to a moral vision of the laws of war as the frame for its legal and realist arguments, by noting that a basic moral principle of the laws of war is the protection of noncombatants. This principle requires combatants to separate themselves from noncombatants through uniforms or other identifying insignia and, more importantly, to conduct themselves according to the laws of war. In its view, neither al Qaeda nor the Taliban met those requirements and therefore could not benefit from laws of war created not only to protect legal combatants but also to create incentives to follow the laws of war and penalties for failure to do so.

One may agree or disagree with the Bush administration's characterizations of al Qaeda or the Taliban. Amnesty International ("AI") has taken the position that the Taliban forces were forces of a government, hence entitled to Third Geneva Convention privileges, and that al Qaeda in their midst were part of the governmental forces of Afghanistan, entitled to the same protections.¹⁶ Human Rights Watch ("HRW") has taken the position that Taliban forces are entitled, as government forces, to Third Geneva Convention protections, while some al Qaeda forces might be as well, depending on the circumstances and on their degree of integration into Taliban forces.¹⁷ Both AI and HRW agree that determinations of individual status require individual judicial hearings—a view with which I agree as a matter of sound policy, although not as a requirement of law. As I have noted elsewhere, that is not literally what the language of the Third Geneva Convention requires.¹⁸ This is a legal point that neither AI nor HRW have troubled themselves to address, secure in their ability to garner media attention by claims that the Bush administration has acted lawlessly and without regard to the Third Geneva Convention—disingenuously ignoring legitimately conflicting interpretations of the Third Geneva Convention while claiming that the Bush administration lawlessly ignores the Convention's text.

More germane is that the Bush administration and its lawyers have demonstrated a willingness to enunciate a vision of the laws of war which does

¹⁶ See, for example, Amnesty International, *Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantánamo Bay 2*, available online at <[http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510532002ENGLISH/\\$File/AMR5105302.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510532002ENGLISH/$File/AMR5105302.pdf)> (visited Sept 17, 2003).

¹⁷ See, for example, letter from Kenneth Roth, Executive Director, Human Rights Watch, to Condoleezza Rice, National Security Advisor 2 (Jan 28, 2002), available online at <<http://www.hrw.org/press/2002/01/us012802-ltr.pdf>> (visited Sept 17, 2003).

¹⁸ Anderson, *Who Owns the Rules of War?*, NY Times § 6 at 41 (cited in note 6).

not cede the moral high ground to organizations and states which have no responsibilities for security or fighting. This vision is based firmly on the fundamental distinction between combatant and noncombatant and legal and illegal combatancy, with privileges or penalties attached to the respective statuses.¹⁹ The Bush administration has been far from consistent in articulating this vision; indeed it initially asserted a legal view in which the laws of war were, quite wrongly, disregarded, then scrambled to fit its views into the framework of the Third Geneva Convention. It has missed many opportunities to reiterate the fundamental morality of the legal versus illegal combatant distinction. It is not evident, at least from the outside, that the administration yet understands that one reason it has received relatively little criticism from the US media about the detainees at Guantánamo, despite a flurry of critical reports from AI and other human rights advocates, is that it forced the media to confront the issue at least partly on the moral ground of the protection of noncombatants. Some journalists, at least, were sufficiently educated in the issue's moral and legal intricacies to be far more cautious than usual in parroting the criticisms of the NGOs, whether or not they agreed with the administration. Surely it is this articulation of the moral importance of noncombatant protection that has been crucial in arguing against the International Committee of Red Cross ("ICRC"), which has asserted that *if* the detainees are not covered by the Third Geneva Convention, they thereby become protected as civilians under the Fourth Geneva Convention, which confers, in some respects, even greater rights than those accorded to prisoners of war.²⁰ Only by asserting the moral principle of the protection of noncombatants is it possible to note the perversity of the ICRC's position: by abusing the laws of war, one loses prisoner of war protection but gains the even better status of a *civilian*.

The US government came out of this debate better off than it otherwise would have because it was willing, albeit tentatively and only partially, to assert its own moral vision. Yet the assertion of this kind of moral vision, which gives one's legal position public persuasiveness, cannot be effective if done merely as a public relations device. If key political and legal officials, starting with the Secretary of Defense, do not themselves fundamentally understand and believe the moral claim, there is little possibility that others will believe it, either.

¹⁹ See, for example, US Department of Defense, *DoD News Briefing—Secretary Rumsfeld and Gen Myers*, available online at <http://www.defenselink.mil/news/Mar2003/t03202003_t0320sd.html> (visited Oct 3, 2003) (explaining affirmatively that defenders as well as attackers have obligations to protect civilians and that the use of hostages and other measures against civilians was a war crime).

²⁰ See Oscar M. Uhler, et al, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (International Committee of the Red Cross 1953) (Ronald Griffin and C.W. Dumbleton, trans).

Yet in my experience, US military lawyers and officials have a moral vision, at least on basic matters such as protection of noncombatants. It is too rarely on display, and it is far too rarely presented as the frame on which legal arguments rest. Still, it is one which has animated their view of illegal combatants and their refusal to agree, for the sake of smooth relations with erstwhile allies, to treat illegal combatants as prisoners of war. Insisting that illegal combatancy carries penalties has been diplomatically costly, but it is a cost of defending a certain moral view of noncombatants. This vision of the requirement of legal combatancy has a history in the US defense establishment that precedes the Afghanistan war, the Iraq war, and the war on terror; it is fundamentally the moral vision of the laws of war which has undergirded US opposition to 1977 Additional Protocol I²¹—that is, that Protocol I immorally blurs the line between combatant and noncombatant, to the very serious detriment of civilians.²² The US is right to oppose such provisions of Protocol I, and it is a disgrace that the leading human rights NGOs, supposed purveyors of “the” moral vision of the laws of war, have so uncritically accepted the application of Protocol I without regard for its lower threshold of civilian protections.

V. CONCLUSION

The conclusions of this speculative inquiry into the moral role of US military lawyers in negotiating and propounding the United States’s view of the laws of war are necessarily, well, speculative. But the following may be suggested:

First, moral visions matter in representing the position of the US on the laws of war. They matter partly because that is the language of those with whom the US must deal and negotiate on these matters, but above all because the laws of war are grounded in moral visions of law and the just war. At the same time, the content of the moral visions of the US and its interlocutors do not always coincide, and differences matter. Sometimes there are differences because the US faces moral considerations that other parties do not, such as the obligation to fight and win wars, which is as much a moral question as it is a question of realism. Other times the differences in moral vision arise because the US has a different, and sometimes morally better and clearer, understanding of the basic

²¹ Protocol Additional to the Geneva Conventions (1949), and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 16 ILM 1391 (hereinafter Protocol I).

²² See, for example, Ronald Reagan, *Letter of Transmittal*, 81 Am J Intl L 910, 911 (Oct 1987) (informing the Senate of President Reagan’s conclusion that Protocol I cannot be ratified).

moral commitments of the laws of war, as in the case of the extraordinary moral deficiencies of Protocol I.²³

Second, different issues raise different *kinds* of moral visions. We have seen two in this Article. One has been about the nature of the laws of war themselves, their humanitarian underpinnings and their relationship to the fundamental combatant-noncombatant principle. This is an issue that goes to the heart of the subject matter of US military lawyers, and on which they themselves have developed both a legal practice and a moral vision. But another has been about the nature of political community and its allegiances, the deepest question of democracy and sovereignty.²⁴ Because the principle of democratic constitutional sovereignty is not, by its nature, special to the laws of war but is instead a fundamental political commitment of political leaders, it is a matter on which US representatives, including military lawyer–negotiators, absolutely must have clear, unequivocal political signals from political leaders. In the matter of the ICC, it scarcely needs repeating that unequivocal signals were sorely lacking.

Third, generalizing the last point, US military lawyers, in representing the US, cannot be expected to present US positions in the framework of a moral vision, whether of laws of war, democratic sovereignty, or anything else, unless they know that they are properly expressing the vision of their client. It is in the nature of the lawyer-client agency relationship, as well as the nature of democratic politics, that statements regarding matters as deep as these contested moral visions *must* come with the imprimatur of higher political authority. The clients must convey a clear vision to their lawyers, and senior political authorities must understand that there can be no compartmentalization of “legal” issues in the laws of war from a moral and political standpoint. Senior political officials need to spend time considering these issues. The formulation of them can be handed off to lawyers, but their resolution—which may wind up being seen and

²³ Sometimes, it is quite true, the US vision is wrong, as I would certainly say concerning the refusal to grant individual hearings to Guantánamo detainees, for it elevates a mere legal literalism over the obvious intent of the Third Geneva Convention.

²⁴ In fact, these two are related in a special way. Liberal internationalism, as I have found in discussions with many human rights advocates in Europe in recent months, is surprisingly—surprisingly, to Americans anyway—unsympathetic to the just war tradition, even the secular just war tradition as enunciated by Michael Walzer in his classic *Just and Unjust Wars*. This is because liberal internationalism embraces the idea that war, and with it, the moral problems addressed by just war theory, disappears in a global society which is seen as fundamentally analogous to a politically settled domestic society—war becomes what the sovereign exercise of violence is in a domestic society, simply police work and the arrest and detention of criminals. If you accept the “domestic analogy” of liberal internationalism, then a tradition of the laws of war based upon just war tradition becomes a holdover from a different era. Certainly this was the attitude I found in Europe—a sharp hostility to the idea of a just war tradition, for the precise reason that just war accepts the concept that some violence might even constitute war.

digested by millions of people watching the Secretary of Defense in a live television briefing—necessarily involves consultation between lawyer and client.

Fourth, US military lawyers need to move beyond the practice of conducting pragmatic, realist negotiations while seeking approval from the moral arbiters among the NGOs and Europeans. The negotiating style in fundamental laws of war matters needs to change; it need not become less realist, exactly, but it should be informed by a realism far more grounded in an explicit, US-held vision of the morality underlying the laws of war. US military lawyers need to understand that they will never be counted as part of the “good guys” whenever their views diverge—as, of necessity, they will—from what NGOs and demilitarized European states think the law is and should be. It is a profound mistake for the representatives of the US to hold a sort of emotional torch, hoping to be let into a church from which they will always be, in some way, excommunicated, because they represent an actor who must deal with power and not merely abstract morality.

This is not, to be sure, an invitation to revel in being “bad guys.” On the contrary, it is a call to US military lawyers to frame their work explicitly within their own moral vision, and not begin by conceding that the defensible moral vision is that which is enunciated by anyone *but* the US government. The US position may not always be the correct one. But to have confidence in one’s moral vision, it is necessary to be willing publicly to declare it, debate it, argue over it with others, and be willing to see weaknesses as well as strengths in it. That cannot happen unless the laws of war are publicly and explicitly framed by the US and its representatives in far more morally visionary terms than they are today.

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The point is that the US government must be willing to put its vision of the laws of war squarely on the table. It needs to regain a large amount of the “ownership” of the laws of war and their development, and it can only do so through the public enunciation of the larger moral frame into which the developing law is set. The US needs to expose its vision to public view and argument, and in so doing subject the visions of others, NGOs and other countries, to like scrutiny and moral argument. It needs to authorize its representatives, its military lawyers and other negotiators, to enunciate that vision and argue for US positions within the boundaries of a moral vision that is endorsed and accepted from the very top levels of the political and defense establishment. The US needs to reclaim a central position in the shaping of the laws of war—for they are being reshaped, in part, by the wars in Afghanistan, Iraq, and the war on terror, not by treaty, but by practice, the practice of states.

It is not enough that the US act a certain way; if it wants its practice to emerge as the developing law of war, it must be willing to assert publicly its practice *as* law. That requires placing it not only within the language of existing treaties on the laws of war to which the US is a party, but also within the core moral vision that military lawyers specially consider their jurisdiction, the so-called laws and customs of war. The US needs to think about the development of practice, custom, and customary laws of war in the long term, at senior levels of the government, and understand that however abstract these issues might seem to be, they suddenly become tangible, concrete, and monstrously real in the instant of crisis. The senior, political, and civilian levels of government need to think and make decisions about the content and development of a long-term vision of the laws of war, and to authorize their legal representatives to assert that vision in negotiations and dealings with others in the world.

To do so is a great inconvenience, surely, for busy senior public officials. But the participation of the most senior civilian officials in the fundamental formulation of how the US fights its wars with respect to law and morality is a *sine qua non* of democratic sovereignty. Democracies hold political officials accountable for the moral content of military actions. The laws of war are not merely technical matters of law which can safely be left to the lawyers, nor can the lawyers perform their function without the active input of senior officials in establishing the fundamental moral content of the laws of war. Law, policy, and public scrutiny of the laws of war are inextricably and permanently intertwined.